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Food·Drug·Cosmetic Law

Journal

The Basis of Strict Products Liability

By REED DICKERSON

This Paper Was Presented Before the Division of Food Drug Cosmetic Law, Section of Corporation, Banking and Business Law of the American Bar Association at the Annual Meeting in St. Louis, August 9. It Is a Companion Paper to "Restatement or Reformation?" by William J. Condon, Which Appeared in the August, 1961 Issue of This Magazine. Mr. Dickerson Is Professor of Law at Indiana University and Author of *Products Liability and the Food Consumer*.

AT THE 1961 MEETING of the American Law Institute, the Reporter for the *Restatement of the Law of Torts, Second*, Dean William L. Prosser, proposed that the following new section be inserted:

Section 402A. Special Liability of Sellers of Food.—One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for bodily harm thereby caused to one who consumes it, even though (a) the seller has exercised all possible care in the preparation and sale of the food, and (b) the consumer has not bought the food from or entered into any contractual relation with the seller.

Before turning to what I consider the solid merits of the proposed section, let me mention several reservations and the related questions that they raise. The first of these relates not so much to the text of the section as to what is claimed for it by its authors. A comment to

the section explains that the term "food" is intended to include all products for ingestion by humans, including drugs that are so consumed. On the other hand, the comment also tells us that "food" does not include clothing or hair dye. In view of the modern tendency to legislate by legislative history, this statement is generously reassuring!

Even so, the comment invites strong misgivings. If the authors mean to cover so wide an area, why should they not say so in the section itself? Moreover, the category is broadened to include ingested drugs, other problems arise. First, as the critics of the section have been quick to point out, it becomes harder to support the proposed section as a "restatement" of the law. Second, it becomes harder to find policy reasons to support a section that goes so far and no farther. Why, for example, should privity-free liability be imposed in the case of an ingested drug and not in the case of a nasal spray or a suppository? It is ironical that, according to the interpretative comments, it would include a tularemic rabbit that infected a chef who merely handled it, but exclude a surgical nail that was consumed internally.

The essential undesirability of the stopping place proposed by the official comments was so apparent that the institute voted to extend the principle expressed by the proposed section to cover all products for intimate bodily use. While this makes more consistent sense from a policy standpoint, it makes it correspondingly harder to call the proposed section a "restatement" of current law.

One of the most interesting features of the proposed section 402A is that it says nothing at all about implied warranty. The comments to the section explain that this is done for several reasons. First, warranty traditionally requires reliance on some promise or representation of the seller, which would be hard to spell out in a situation in which the consumer may not even know or care who sold the product. Second, although warranty has some of the aspects of tort, many courts insist that it is inseparable from a sale between the parties. Third, warranties are covered by the Uniform Sales Act, which has been construed by many courts to exclude warranties to anyone other than the immediate buyer. Fourth and fifth, additional problems relating respectively to damages and disclaimers integral with the concept of warranty should, of possible, be avoided. Finally, it would be anomalous to include in the restatement one kind of warranty while excluding all others. All these problems are swept aside by the simple device of not mentioning the naughty word "warranty."

This line of reasoning baffles me. How can merely classifying such a responsibility as a new tort obligation make it any less a warranty, especially when many authorities, including some courts, have long contended that breach of warranty should be treated as a tort? Moreover, the mere use or avoidance of a name has not been notably successful in preventing the courts from doing their own classifying. Courts sophisticated enough to pierce the corporate veil or to declare a statute general in form special in substance can certainly penetrate a label or, conversely, supply a missing one.

Is the obligation described in the proposed section 402A in effect a warranty? It has most, if not all, of the characteristics of a warranty: It performs the function of a warranty. It relates to the quality of the goods. It is engrafted on a sale. It affects a relationship dealt with by the Uniform Sales Act. What, then, is lacking? Certainly, the mere absence of an actual promise or representation is not significant in view of the long history of the warranty implied in law.

The problem may become largely academic in view of the apparent indifference of the courts in some states to the language of the Uniform Sales Act and in view of the replacement of that act by the Uniform Commercial Code in others.

Within the area of its coverage, the proposed section 402A would (1) do away with the privity requirement at all levels of manufacturing and distribution, and (2) impose on each seller coming within its terms the responsibility of strict liability.

In doing away with privity, would the proposed section reflect the preponderance of existing law, or would it pull itself up by its own bootstraps by purporting to reflect law that it was only creating? So far as food is concerned, a good case can be made for calling this a true restatement of at least a majority of the courts that have expressed themselves on the subject. For drugs and cosmetics and other products for intimate bodily use, on the other hand, the trend toward abolishing the privity requirement has lagged far behind. Although in this area it would seem difficult to sustain the proposed section as a "restatement," its authors contend that the great bulk of the privity cases are old ones not fully representative of current judicial thinking.

While it may be desirable for the American Law Institute not to mislabel its own products, the question of how fully the substance of section 402A reflects existing law hardly affects the merits of the rule of law that it states. Whatever difficulties there may be in rational-

izing that section as a restatement of current law, there is little occasion for extended mourning over the death of the privity requirement. For food, it is time for the funeral and, if present indications are reliable, it is only a matter of time before the privity requirement will be dead for most other products as well.

The privity requirement made a lot of sense in the kind of casual transaction that took place between two farmers in the simple sale of a horse, where the seller had no reason to be concerned in the transaction beyond his immediate buyer. If the buyer later resold the horse, that was likely to be a wholly independent and unrelated transaction. How different the pattern of mass distribution of complicated fabricated goods is today. The manufacturer knows, when he sells to a primary distributor, wholesaler, or retailer, where the goods are ultimately going, and he is equally interested with them in seeing that the goods get there. In such a climate, the factual presuppositions of the original privity doctrine seem unreal.

Some courts have begun to see that, whether or not they constitute express warranties, manufacturers' advertising appeals today are aimed primarily at the consumer, over the heads of any intervening distributors. This either makes the privity requirement a meaningless anachronism or allows us to argue, with good logic, that even if there is still a privity requirement the manufacturer and consumer comply with it because in effect they deal face to face.

One of the most persistent arguments for the retention of the privity requirement is that it gives the manufacturer a needed shield against the fraudulent claim. A high percentage of claims for products liability appears to be either downright fraudulent or, more often, valid in part but grossly exaggerated.

Although there is reason to be sympathetic with the manufacturer in his predicament, the privity requirement is for this purpose wholly unselective. It gives the manufacturer a welcome defense against the fraudulent claim, but it also lets him out when, as often happens, he is confronted with a valid one. Some manufacturers will undoubtedly answer that, as a matter of grace, they often make an appropriate settlement of an honest claim even though they are not legally accountable. Unfortunately, this leaves the consumer at the mercy of the manufacturer. I suspect that some manufacturers are not so generous.

Moreover, the manufacturer is no more vulnerable to a fraudulent warranty suit than he is to a fraudulent negligence suit. Most manu-

facturers are already stripped of privity protection in negligence suits and, if they do any direct selling, in warranty suits as well. No plaintiff can fake the defendant's negligence as such, but he can and often does fake causation. For this reason, it seems that so far as the chances of fraud are concerned there is no real difference between a products liability suit brought on the theory of negligence and one brought on the theory of warranty.

The privity requirement is an anachronism that we would do well to get rid of as soon as possible, at least in the mercantile context that we have been considering. The problem to which the legislatures and the courts must now address themselves is that of defining the kind of liability to which the manufacturer should be exposed. While manufacturer's direct liability is not necessarily strict liability, that is the likely result if he is made directly accountable to the consumer. The remainder of this discussion will therefore be directed to two general questions relating to strict liability: (1) Should the manufacturer be strictly liable to the consumer? (2) If so, what should this liability consist of?

As to the first question, it seems clear that the manufacturer should be so liable, and for the following reasons.

Strict liability provides an effective means of bolstering direct controls in encouraging the manufacturer to make a safe product. Experience indicates that this encouragement is an effective one and the only remaining question is whether this kind of preventive measure is necessary or desirable.

One basic objection to strict liability has been advanced by none less than Dean Roscoe Pound. Writing in 1950 (36 *American Bar Association Journal* 977, at p. 981), Pound attacked what Professor James and others are calling "enterprise liability" (e. g., 24 *Tennessee Law Review* 928 (1957)) as a kind of "welfare" measure better left to legislation and having even a touch of Marxism. Others have found in it part of the drift toward governmental paternalism. Although I have the profoundest respect for this great legal philosopher, it seems likely that in statements such as these he and the others have failed to take adequate account of the currents that have made it necessary and even desirable to arm the consumer civilly. Such views not only make false assumptions about the nature of strict liability but are based on an outworn view of the position that the consumer holds in the general marketing scheme.

In Adam Smith's self-regulating economy, it was assumed that buyer and seller bargained, and sellers competed, in a climate of relative equality. Compare an economy in which the goods are so complicated, manufacturers are so removed from the consumers they ultimately serve and the relative sophistication of consumer buyer and corporate seller is so disparate, that the consumer is at the mercy of those who are supposed to serve him, unless the law adds its counterweight.

As against the contention of Dean Pound made in 1950, consider the views of an equally eminent legal philosopher, writing in 1960 (40 *Boston University Law Review* 167, at pp. 183, 185):

. . . we must break away from the idea of fault as the fundamental and exclusive ground of liability . . . Must we not seek repair of injuries incurred as incidents of what is done with no intent or purpose of causing injury, but involving in the course of carrying it on . . . great possibility of injury to others?

What eminent legal philosopher said this? Surprisingly enough, it was Dean Roscoe Pound, who in the meantime had apparently drastically revised his views. Incidentally, there is no reason to think of strict liability as some new, alien development. The retailer has long been strictly accountable to the consumer. For food, this responsibility goes back 'probably to the 13th century. In fact, the earliest tort liability did not even distinguish between the intentional and the accidental.

Assuming that the consumer should be protected against the over-reaching manufacturer or other seller, buyer and seller can be put on a more equal basis in two ways. First, by direct governmental regulation such as the enactment of pure food laws. Second, by arming the consumer with civil remedies and defenses designed to give him more adequate means of looking after himself. As one who has spent more than 16 years as a Washington bureaucrat, I have come to look at direct government participation as a second-choice approach. In principle at least, it would seem preferable to let the consumer fight his own battles and to help him do it by giving him enough private legal weapons and factual information that he will have some chance of striking an effective blow in his own behalf. Unfortunately, in the field of food and other products for intimate bodily use, it looks as if we may need both approaches.

Prevention through civil liability normally gives the manufacturer two alternatives. He can try to improve his product to make it reasonably safe, and he can help the consumer protect himself, at little cost to the manufacturer, by including with the product adequate

warnings or directions for use. Such an approach has reduced the liability of sellers of rotary lawn mowers and, in view of the apparent feasibility of including cooking instructions with pork products, it is surprising that sellers of pork continue to complain about trichinosis judgments.

The second argument for strict liability is that it makes possible a sharing of the risk or loss among consumers generally. So far as the manufacturer is induced by civil liability to improve his product and reflect in his prices the costs of improvement, he can be said to be "spreading the risk." So far as such improvements are unsuccessful and he is induced to reflect in his prices the costs of paying injury claims, he can be said to be spreading the loss." Such price increases provide a kind of industry-wide self insurance.

What about the seller's ability to absorb or pass on to the consumer the costs of further improvements, additional precautions, increased recoveries, or product liability insurance? As I pointed out on another occasion (16 Bus. Law. 683 (1961)):

Where the financial burden is shared by an entire industry, no problem appears to be presented, because even under highly competitive conditions the industry as a whole can adjust its general price level to reflect cost increases. A problem would appear to arise only for a manufacturer whose particular product or method of operations exposes him to risks not shared by others in the same highly competitive industry. A possible example might be carbonated drinks in glass, with its explosion hazard, as against carbonated drinks in tin, with no corresponding hazard. But even here, average costs of this kind would seem to be relatively trivial as compared to cost increments such as wage increases. So far, there is nothing to indicate that the imposition of strict liability has had an adverse affect on any seller who has taken the precaution of covering the worst of his risks with a deductible product liability policy.

One commonly met objection to strict liability for defective fabricated goods is that it expresses a kind of subversive, "deep pocket" philosophy: If someone who cannot afford the loss gets hurt, let someone who can afford to do so underwrite it; in this case, a rich manufacturer or distributor. Of course, even this interpretation of strict liability would not let the injured consumer grab at random for a rich indemnitor. It would at least limit liability to those who had a causal connection with the consumer's injury by being in the chain of manufacturing and distribution.

Here is where I believe many of the opponents of strict liability have been impliedly misrepresenting it. What do we mean by "strict liability"?

It is commonly assumed that to make out a case of strict products liability all the plaintiff has to show is that the defendant caused the plaintiff's injury. Here, we should distinguish between strict liability, on the one hand, and *strict* strict liability (what someone has recently called "liability without warranty"), on the other. By "*strict* strict liability," I refer to the kind of liability that is imposed under workmen's compensation, where all the claimant has to show is the causal relationship involved in an injury arising out of and in the course of his employment.

Under simple strict liability, on the other hand, and that is what we are considering here, it is not to be assumed that, if the courts do away with the privity requirement and expose the manufacturer to strict liability, he will automatically have to indemnify every person who is injured by one of his products. For example, the proposed section 402A does not say that the seller must pay the consumer some money if his product injures the consumer. The food must be, first, "defective" and second, "unreasonably dangerous." Not everything that causes injury or illness is either defective or unreasonably dangerous. Some of those who tend to panic in the face of possible strict liability do not fully realize that strict liability need not be so strict that the only issue is one of causation.

Although I had long thought that the question whether the product was unreasonably dangerous was simply the most reliable way to measure defectiveness, making the latter term surplusage, the word "defective" was retained in section 402A on the ground that it was needed to nail down the kind of case in which the product was improperly made; and to excuse the manufacturer of a highly dangerous article that was properly made. Apparently, it was feared that without the word "defective" a highly dangerous product might be considered to be *ipso facto* unreasonably dangerous. Under the section as it now stands, it is interesting to speculate as to what kind of situation could exist in which the product was "unreasonably dangerous" without being legally "defective."

In any event, it is important to formulate appropriate concepts of what is "defective" and what is "unreasonably dangerous." How these concepts are developed will determine the ultimate impact of doing away with the privity requirement and imposing strict liability. The appropriate development of these concepts can also furnish the key to such difficult legal problems as those involved in trichinosis,

allergies, disclaimers, and warnings. While the most provocative questions appear to be arising outside the field of food, much needs yet to be done to clarify the law relating to food.

In the traditional suit for negligence, the main problem beyond that of causation is to stigmatize the actions or omissions of the defendant. Under strict liability, on the other hand, the problem of stigmatizing the defendant is apparently removed. Even so, the plaintiff must stigmatize the product as "defective" and "unreasonably dangerous." In the usual food case, this is a simple matter. A mouse is enough to stigmatize a bottle of soft drink. *Staphylococcus* is enough to stigmatize a custard-filled éclair. Both are legally "defective." Both are "unreasonably dangerous."

Unfortunately, such simple and typical instances do not give us a ready key to a concept of "defectiveness" on which products liability generally should be based. Let us consider several specific problems.

In the field of food, the courts are still fighting the battle of the chicken pie. Is a chicken bone in a chicken dish enough to make it legally defective? While many courts use the test of whether the offending object is "foreign" or "natural" to the product, the most sensible test, which is adopted by many other courts, is the "reasonable expectations" test: Is the offending condition one that consumers normally anticipate and guard against? Here, a philosophy of consumer protection based on the reasonable expectations of the parties helps to supply a sensible answer.

What about trichinae in pork? Here, again, the "reasonable expectations" test seems to offer a helpful approach. Do normal consumer precautions include cooking pork to the thermal death point of trichinae? If so, trichinous pork can well be considered as not being legally defective. If this approach is correct, we cannot evaluate a product merely by looking at it or by measuring the harm that it can potentially do to a consumer. We must appraise it also in the context of what people usually expect and guard against in the kind of situation presented. The problem of defining a legal defect arises also for allergies, for which the courts are beginning to find satisfactory answers in the reasonable expectations of the parties.

The concept of defectiveness of a product depends ultimately on the concept of what the offending "product" is. This, in turn, includes the concepts of contemplated use and contemplated performance. What may be legally adequate for one purpose may be legally

inadequate for another. Thus, even within the framework of strict liability the manufacturer may have an escape hatch in the concept of contemplated or normal use. For example, in *Mannsz v. MacWhyte Co.*, 155 F. 2d 445 (CA-3, 1946), 13 NEGLIGENCE CASES 524, the defendant manufacturer of wire rope got off the legal hook, even without the help of the privity requirement, because the plaintiff's use of the rope in question, which was to support a scaffold, was one abnormal to that kind of rope.

The drug cases present problems that are hard to solve even with the help of a sophisticated philosophy of consumer protection. Part of the problem lies in the fact that for many drugs no clear concept of "normal use" has yet emerged. Chemical X may be good for curing flea bites, fair for curing eczema, and poor for curing seborrhea. What expectations have sufficiently crystallized to serve as a criterion here?

One of the strongest arguments against the extension of strict liability is that it would impede the development of new products. But, again, how serious this might be depends on how "strict" the strict liability is. Within the concepts of "defective" and "unreasonably dangerous," this ultimately depends on how the interest in protecting the reasonable expectations of consumers is balanced against the interest in not making unreasonable demands on the capacity of manufacturers to provide this protection. If the manufacturer is aware of the potential danger, normally he can either improve the product by removing or minimizing the danger or provide a suitable warning or suitable directions for use.

The crucial case, of course, is that of the new product whose benefits have fanned the expectations of consumers but whose latent dangers, which may be considerable, have not yet been revealed. Thus, the big issue in the non-food cases today is whether a product is to be considered as legally defective, even under strict liability, when it produces serious harm at a time when not even scientists are adequately aware of its potentialities. For aircraft the Electras provide a beautiful example. Some precedent exists for saying that a product is not legally defective until at least scientists know its dangers. Thus, in the allergy cases courts that permit recovery make it a condition of liability that the product have an ingredient that is known to be capable of inflicting harm on a significant, generally determinable percentage of the public.

While this approach has some judicial acceptance, fears have been expressed that a similar approach to new products not yet known by scientists to be unreasonably dangerous, by giving manufacturers one free shot at the public, make them guinea pigs for products that should have been more adequately tested before being marketed. On the other hand, even Dean Prosser, reporter for the restatement, has expressed sympathy with the objective of protecting the still ignorant manufacturer of a new drug product. That such notions can be accommodated within the concepts of "defective" and "unreasonably dangerous" should comfort those who have been thinking that all would be lost if the current assault on the citadel of privity is ultimately successful, as it most probably will be.

On this perplexing problem, it is hard to take sides. It is not even clear that what makes sense for one kind of product makes sense for another. For present purposes, the important point is that these issues can be resolved according to the best dictates of public policy within the framework of strict liability itself; that is, through the concepts of what, under the circumstances, the law is to consider "defective" and "unreasonably dangerous." It is unnecessary, therefore, to reject the advantages of strict liability to cope with this problem.

It is, indeed, a gross exaggeration to put at opposite poles what represent only modest differences in degree. On the one hand, even liability for negligence is a kind of strict liability so far as it holds a person to a general standard of conduct without regard to his peculiar idiosyncrasies. On the other hand, strict liability, despite its name, also deals with the defendant's conduct and differs only in that it substitutes what has been called in other contexts a "performance standard" for a standard that deals with specific conduct. In short, this kind of strict liability differs from negligence only in eliminating the necessity of proving specific acts of negligence.

This fact provides one more reason for supporting strict liability. What we have been calling liability based on fault in the products cases has been for the most part strict liability. The reported cases indicate that the courts have rarely been able to try a bona fide negligence issue in the field of products liability, particularly in the case of food, because the specific facts surrounding the defect are rarely known to either party. In practice, if the plaintiff can persuade the jur that the defect was in the product when it left the defendant's

plant, the inferences are usually drawn in his favor on the theoretical issue of negligence, with or without an assist from the doctrine of *res ipsa loquitur* or that of negligence per se. Because this is only paying lip service to culpability, the privity requirement has probably served only to drive strict liability into the legal underground.

Even apart from the hypocrisy involved, law suits should not be cluttered with pretended legal issues that in most cases are neither being litigated nor susceptible of being litigated. Strangely enough, the imposition of strict liability will affect the trial of products liability cases very little, beyond eliminating some of the formal legal arguments that lawyers now make. The central factual issue in a products liability case will continue to be what it has been all along: Assuming that the product that injured the plaintiff was legally "defective" and "unreasonably dangerous," can the condition be traced to the defendant's plant?

While we may feel some nostalgia for the fading issue of privity, we will do better to direct our efforts to solving the two central problems of strict liability today, those of "defectiveness" and proof of causation.

The issue of strict liability is no longer "whether" but "of what kind."
[The End]

COMMISSIONER LARRICK SPEAKS ON QUACKERY

Commissioner of Food and Drugs George P. Larrick said on October 6, that consumers spend more than \$1 billion a year "needlessly on falsely represented drugs, foods and cosmetics."

Speaking before the National Congress on Medical Quackery at the Sheraton-Park Hotel, Commissioner Larrick said that the cost of vitamin and so-called health food quackery alone has been "estimated conservatively at \$500 million a year." The Congress was sponsored by the American Medical Association and the Food and Drug Administration.

Mr. Larrick said that there were three major kinds of quackery from the standpoint of protecting the public by both law enforcement and education—fake medical devices, pseudo science in nutrition, and false claims for drugs and cosmetics.

"From the standpoint of consumer protection the greatest harm being done by quack devices today results from continued use of individual units by local practitioners," he said. "For this reason, we are making public today a list of devices which have been outlawed by court proceedings under the Federal Food, Drug and Cosmetic Act, and which we have cause to believe are still extant and still being used.

"The most widespread and expensive type of quackery in the United States today is in the promotion of vitamin products, special dietary foods, and food supplements." Mr. Larrick appealed for help from health and nutrition educators at all levels to stem the tide of quackery.